No. 2760

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HALVORSEN TRANSPORTATION COMPANY (a corporation), J. B. ARKISON, H. C. HALVORSEN, GEORGE W. DORNIN, C. R. CODDING, G. C. CODDING, P. S. COLBY and A. M. DEVALL, and a certain barge and the gasoline launch "SEVEN BELLS", her engines and machinery and appurtenances,

Appellants,

vs.

V. J. B. CHEDA,

Appellee.

BRIEF FOR APPELLANTS, HALVORSEN TRANSPORTATION COMPANY ET AL.

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Of Counsel.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of Facts.

On the 31st day of December, 1913, the launch "Seven Bells", with a barge belonging to the respondent, Halvorsen Transportation Co., in tow, set out on one of their regular voyages, on the Bay of San Francisco, from the Port of San Fran-

cisco to the Port of San Rafael. The weather had been more or less stormy the day previous, but the storm had apparently abated, and, at 8:15 o'clock that morning, when the launch and barge cast off from the seawall, in San Francisco, the sea was smooth, with a slight swell running from the south. A fair, but moderate, breeze was blowing from the southeast, and the weather continued to be moderate while they were crossing the channel, and up to Southampton Shoal, where shelter could have been had by putting into Raccoon Straits. At that point, they hauled off towards the Marin shore in order to avoid the swell up the bay caused by the storm of the day before. No change in weather was noted until they had California City abeam, when the wind increased and shifted a little to the westward, probably due to the high hills along the shore at this point. Between California City and Point San Quentin, the wind had become more violent and blew in squalls, but, as no shelter could be had on account of the rocky beach on the shallow lee shore, no course was open to them other than to continue on their voyage. After passing Point San Quentin, the wind increased in violence and, before the entrance to San Rafael Creek was reached, one of the worst storms ever known on the bay was raging. At that point the wind was blowing in squalls. In addition to this, the extremely shallow water at the entrance to the creek made it impossible to effect an entrance, nor could

the barge be towed to the nearest place of safety, the lee side of the Marin islands, as the launch struck bottom in the trough of every sea. Under such conditions, no steerageway could be had on the launch, and, being further handicapped by the tow, navigation in the storm was entirely out of the question. There was no choice left to the captain of the launch, and he did the only thing which could have been done under the circumstances; that is, drop the barge and attempt to allow it to drift up on the mud flat near that point. Owing to the strong, squally wind, the action of the breakers, the tide and the currents, the barge did not drift on the mud flat, but, instead, was carried against the rocks near the entrance to the creek, where it broke up, and nearly all of the cargo of general merchandise was lost.

This action was brought by an assignee of the cargo owners to recover the value of the cargo so lost, and the Court below held that the owners of the barge, the Halvorsen Transportation Co., and its stockholders, were liable, with the "Seven Bells", for its loss, because

> "while the 'Seven Bells' was able to handle the barge in deep water, or on the flats in fair weather, she was not sufficient to handle the barge on the flats in rough weather, and that, therefore, the combination of the barge and launch was not sufficient for the business in which they were engaged for weather ordinarily to be expected in winter".

The Assignments of Error.

The appellants, in their assignments of error, contend that the District Court erred in:

(a) Ordering a decree in favor of libelants.

(b) In not dismissing libelants' amended libel.

(c) In concluding that the launch "Seven Bells" and the barge were not sufficient for the business in which they were engaged for weather ordinarily to be expected in winter on San Francisco Bay, and its tributaries.

(d) In concluding that the launch was not sufficient to handle the barge in weather ordinarily to be expected in winter on San Francisco Bay and its tributaries.

(e) In concluding that the launch was not sufficient to handle the barge on the flats near the mouth of the San Rafael Creek in rough weather.

(f) In concluding that the weather during the times involved in the case at bar was such as would be ordinarily expected on San Francisco Bay at that season of the year, and in not concluding, finding and holding that a storm arose with a suddenness and of a violence extraordinary, unusual and not foreseeable, which caused the loss, and that said storm was an act of God and a peril of the sea.

(g) In not concluding, finding and holding that the appellants, the owners of the barge, had exercised due diligence to provide a seaworthy barge and to employ a seaworthy launch.

(h) In concluding, finding and holding that the peril encountered by the launch and barge could have been weathered by a seaworthy vessel, and in not concluding that said peril was the proximate cause of the loss and not the unseaworthy condition of the launch and barge, if they were unseaworthy.

(i) In not concluding, finding and holding that if the proximate cause of the loss was an unseaworthy condition of the launch and barge, but, nevertheless, the owner of the barge had exercised due diligence to make the barge seaworthy and to employ a seaworthy launch, said appellants were exempt from liability by the bill of lading under which said cargo was shipped.

(j) In not concluding, finding and holding that said appellants and the owners of the barge were exempt from liability under the provisions of the Harter Act.

(k) In not concluding, finding and holding that the liability, if any, of said appellants and the owner of the said barge was limited to the amount or value of their interest in the barge and freight just after the stranding and wrecking, under the Act of Congress called the "Limited Liability Act".

Argument.

In view of the fact that the launch "Seven Bells" was not owned, nor controlled, by the respondents, nor were those in charge of the launch under their

direction, or supervision, as shown by the undisputed testimony of the witnesses for both the claimant and respondents, we are not concerned with any alleged acts of negligence in regard to the navigation of the launch. For that reason, our argument will be confined to the alleged unseaworthiness of the tug, the seaworthiness of the barge, and such other matters as relieve the respondents of liability.

THE HARTER ACT.

We will first consider the Harter Act as a complete defense to the action. The third section provides:

> "Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The burden of proof then, in the absence of the contract, is upon the carrier to show that he did exercise due diligence to make the vessel seaworthy, properly manned, equipped and supplied, and, furthermore, to show that the goods were damaged or lost by one of the causes mentioned in the third section above quoted. Having offered sufficient evidence of the performance of the above obligations and the cause of loss, or damage, to establish a prima facie defense, if no further testimony were taken the libel would necessarily be dismissed. The weight of evidence, not the burden of proof, shifts then to the libelant and he must offer proof in rebuttal that the carrier did not provide a seaworthy vessel, or that the loss, or damage, was not occasioned by the causes named in said Section 3, or that it was due to some other cause from which the carrier is not exempt under the Act. Negligence is never presumed, and, if the carrier claims that, even though it was proved the carrier had used due diligence to make the vessel seaworthy, and the loss or damage was occasioned by one of the exempted causes, still the goods would not have been lost but for some negligence on the part of the carrier, the burden of proof is upon the libelant to establish such negligence.

The Lind, 12 How. 272;

Western Transportation Co. v. Downer, 11 Wall. 129;

Cau v. Railway Co., 194 U. S. 427;

The Folmina, 212 U. S. 354, p. 362.

THE BARGE WAS SEAWORTHY.

The barge used by the respondents in the San Rafael trade was 68 feet over all, with a 28 foot beam, a draft of from 12 to 16 inches, and was the usual type of barge engaged in that class of trade on the bay. It was practically new and admitted to be water tight and in good condition by libelant's witness Silva (Apostles, pp. 53 and 54):

"Q. The barge was a good barge, wasn't she?

"A. Yes, sir.

"Q. Pretty nearly new?

"A. Yes, sir.

"Q. Didn't leak at all?

"A. No.

"Q. How long had you worked on her before this happened?

"A. About three or four months.

"Q. During the three or four months you went over there every day, didn't you?

"A. Yes, sir.

"Q. And sometimes came back at night?

"A. Yes.

"Q. During all that time she never leaked at all?

"A. No, sir.

"Q. That barge had a little house on it?

"A. Yes, sir.

"Q. And the cargo was inside that house?

"A. Yes, sir.

"Q. Covered over so that water could not get in?

"A. It is covered over in front, but she had a door.

"Q. And with a big space in front for wagons to be on?

"A. Yes, sir.

"Q. You said that the rope on the anchor was 5 or 6 inches big. What do you mean by 5 or 6 inches—show us?

"A. About that big around. (Indicating.)

"Q. You could tie a knot in it very easily, couldn't you?

"A. Yes, sir."

The libel alleges that the barge was unseaworthy because it had no anchor chain and only one man on board when it should have had at least two. It appears, however, that the barge was equipped with a two hundred pound anchor and a line five or six inches in circumference. Libelant was of the opinion that a chain should have been provided, but other barges used lines instead of chains and some had no anchors or lines at all. Apparently this point was abandoned at the trial.

Respondents also employed a man to assist with the navigation and handling the cargo. That trade does not require a crew on barges, as they have no steering apparatus or means of propulsion, and the number of men sent along with the barges depends on the number needed for loading or unloading. That the barge was tight, staunch and strong is further shown by the fact that she hauled merchandise of a perishable nature and provisions between the ports of San Francisco and San Rafael for several months prior to December 31, 1913, without loss or damage. Mr. Crowley testified that the barge was a new one and seaworthy. This was uncontradicted.

These facts were not disputed. The loss in the present case could not, by any possibility, be attributed to a supposed unseaworthy condition of the barge. If it had been built of steel and manned by a large crew, the same loss would have resulted. Two anchors with anchor chains would not have held in the soft mud against such a storm, nor would other appliances have been of any assistance whatever, so far as saving the cargo was concerned.

THE DISTRICT COURT ADOPTED AN ERRONEOUS RULE TO DETERMINE THE SEAWORTHINESS OF THE LAUNCH.

We do not wish to admit that the owner of a barge is bound, at all hazards and in all cases, to see that the tug which tows his barge is seaworthy in every respect. It will be remembered, under the contract between the claimants and respondents, the claimants were simply bound to get the barge to San Rafael and back again daily, in such manner and with such launches as they thought advisable to use for that purpose. The Halvorsen Transportation Company could not have been expected to have a representative at the dock every morning to see that the launch the claimant intended to use for the trip was seaworthy; for example, that the spark plugs in the engine were clear and that there was no carbon in the cylinders; that the water, if any, had been drained out of the carbureter and to make proper tests of the fuel in the gas tank, in order to determine whether or not an inferior qual-

ity had been furnished. Neither would it seem reasonable to require the respondents to conduct an examination of each captain furnished by claimants, if different captains were provided for the several trips, yet all of these matters are essential to the seaworthiness of the launch. We have not been able to find any cases holding the owners of a barge liable for the unseaworthiness of a tug not belonging to them, nor apparently has proctor for libelant. In his opening brief in the lower Court he cited the case of *The Wildcroft,* 209 U. S. 378, to support the proposition that "he (the claimant) must show also that the tug boat was sufficient, the master competent; that is, that the master of the tug boat was competent", but we find no reference whatever to a tug boat in that case. In fact, the next case there cited by libelant apparently holds just the opposite.

The Cygnet, 126 Fed. 742.

In that case, the tug with the barge in tow ran into one of the piers of a bridge and the cargo on the barge was lost. The owners of the cargo sued the tug and the owners of the barge. The District Court found that the barge was in fault, and that the tug was not. On appeal, this decree was reversed and the tug found solely in fault. Thereafter the record owner of the tug petitioned for a rehearing, claiming that, as the tug was under charter to the owners of the barge, therefore, it was entitled to the benefit of a limitation of its liability under the provisions of the Harter Act. The

petition for a rehearing was granted, and the Court in the opinion subsequently rendered, declined to pass upon the point as to whether or not that Act would apply to the tug under such circumstances, but held that at all events the tug was not entitled to limit its liability because it was unseaworthy in that it was not properly manned. The decision of the District Court was reversed, and the Court held the barge liable and directed that a decree be entered against the tug alone. If the insufficiency of the tug was so apparent that it would amount to an act of negligence on the part of the barge owner to employ such a tug, we do not mean to argue that the owners of the barge would not be liable. That is materially different, however, from holding the barge owners liable on an implied warranty of the seaworthy condition of a vessel belonging to third parties.

The District Court held that the "Seven Bells" was unseaworthy because, while she "was able to handle the barge in deep water, or on the flats in fair weather, she was not sufficient to handle the barge on the flats in rough weather". This, we respectfully submit, is not the proper method of determining the seaworthiness of a vessel, and we earnestly contend that the Court fell into an error on that point. Under such a ruling, it would be impossible to determine when a vessel was properly equipped for a voyage, because it would depend on what particular part of the voyage she met with the accident. Assume that a vessel of light draft, built

for trade with a shallow draft port of discharge, encounters a storm in the open sea; a severe storm, but not unusual, and one which might have been anticipated on that voyage. On account of her light draft and consequently the small area of her submerged surface, to resist the force of the wind on her exposed surface, she fails to respond to her helm promptly and remains hove to. She falls off from the wind in the trough, shipping a heavy sea, which, combined with her necessarily unusual metacentric height, capsizes her and she founders. On a suit brought by the cargo owners the Court, under the rule stated, would hold that, while she was able to navigate successfully in the open sea, or in the shallow bay at the port of discharge, in fair weather, she was not sufficient to navigate in the open sea in rough weather and that therefore the vessel was not sufficient for the business in which she was engaged for weather ordinarily to be expected on that voyage.

Assume that the owners then purchase a deeper draft vessel for that trade and while attempting an entrance to the shallow bay at the port of discharge is caught by a series of heavy swells, causing the after part of the keel, set deep below the surface to strike the bottom violently and her rudder post is carried away. Being thus unable to navigate, she strands and breaks upon the beach and her cargo is lost. On a suit brought by the cargo owners, the Court, under the rule stated, would hold that, while she was able to navigate successfully in deep water,

or in the shallow bay at the port of discharge in smooth water, she was not capable of navigating in the shallow bay at the port of discharge when a heavy swell was running, and that, therefore, the vessel was not a proper one for the business in which it was engaged for conditions ordinarily to be expected on that voyage.

Under the ruling of the District Court, it would be impossible to have a seaworthy vessel for that trade.

If a carrier has provided a vessel which, by the experience of those engaged in the particular trade, has been adjudged by them to be the best suited to meet all of the requirements of that trade, the cases hold that he has provided a seaworthy vessel.

Tidmarsh v. Ins. Co., Fed Cas. 14,024.

The plaintiff declared on a policy of marine insurance, and the defendant company claimed that because of the insufficiency of her sails and windlass, the vessel was not seaworthy at the time of her departure, which was a condition precedent to the attaching of the policy. Justice Story, in stating the proper test of seaworthiness of a vessel, uses the following language, on page 1198:

> "In short, the true point of view, in which the present case is to be examined, is this, was the 'Emily' equipped for the voyage in such manner, as vessels of her class are usually equipped in the Province of Nova Scotia, and port of Halifax, for like voyages, so as to be deemed fully seaworthy for the voyage, and

> sufficient for all the usual risks. If so, the plaintiff, on this point, is entitled to a verdict."
>
> *The Titania,* 19 Fed. 101.

Under the bill of lading the liability of the vessel to the cargo owners for injury to the cargo depended on whether or not the cargo could have been insured against such an injury and that depended on the further question of whether or not the vessel was seaworthy. In holding that the vessel was seaworthy, Judge Brown, of the Southern District of New York, quoted at length with approval from the opinion of Judge Story, in *Tidmarsh v. Insurance Co.,* including the quotation above set out and continued, on page 107:

> "The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or of the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners."

The cases on this point are reviewed in the *Indrapura,* 190 Fed. 711, decided by this Court in October, 1911. In that case the testimony of the experts, in regard to seaworthiness of the vessel, was conflicting, and also the testimony as to the

custom of the usual construction of such a vessel. This Court was in serious doubt as to whether the vessel should have been held unseaworthy under the circumstances, but did not feel justified in setting aside the conclusion of the district judge. The rule was expressly affirmed, however, that the seaworthiness of a vessel should be determined by the custom and usage of the port and the judgment of prudent and competent persons, though the court observed that such testimony was not necessarily conclusive. In the opinion, the *Lizzie Frank,* 31 Fed. 477, is quoted, as follows:

> "Where a vessel is constructed and equipped in the mode usual and customary with other vessels of like character, and in a mode approved by competent judges and previous experience, then, in case of an accident happening by reason of a latent defect in the equipment and construction, there is no negligence on the part of the owner."

It will be noted presently that there is no conflict in the testimony in the case at bar, either as to the custom and usage of this port, nor in regard to the equipment of the "Seven Bells", nor the use of such a launch for the business in which she was engaged, nor in the testimony of the experts as to the seaworthiness of both launch and barge.

In the case of the *Boston Marine Insurance Co. v. Metropolitan Redwood Lumber Co.,* 197 Fed. 703, decided by this Court in July, 1912, it was contended that the vessel was unseaworthy because of the noise and location of her oil burners. The

Court, however, decided that she was seaworthy because the evidence showed that she had the oil burning apparatus which was in common use in vessels of her class. Citing the *Titania* and the *Indrapura*.

What does the evidence in the case at bar show?

Peterson, an expert called by libelant, on direct examination, testified that a 40 horsepower gasoline boat would be sufficient to handle the Halvorsen barge under ordinary circumstances, but not in a southeast *gale* on the San Rafael flats (Apostles, pp. 68 and 70).

On page 70, the same witness on cross-examination, testified:

> "Q. Speaking from your knowledge of your experience at sea, what is considered a gale, how many knots an hour?
>
> "A. It generally runs up from 40 to 80 an hour.
>
> "Q. And in the answers you were making to Mr. Hutton's questions about a southeaster, you were using 'southeaster' as a term to express a gale, were you not?
>
> "A. Yes, sir.
>
> "Q. You have personally towed boats over to San Rafael, haven't you?
>
> "A. Yes; quite a while ago; I send men over there now.
>
> "Q. You would have no hesitation in sending out a barge similar to this of the Halvorsen Transportation Company with one of your launches, a 40 horsepower launch, when the wind was blowing from 20 to 25 knots an hour here on this side, would you?
>
> "A. No.

"Mr. Bell. You don't suspend your towing business on the bay, do you, between November and January?

"A. No, sir; not at any time in the year."

Witness Gilmore, called for the claimant, testified (Apostles, p. 99) that the launch "Seven Bells" was 46 feet long, with a 15 foot beam, a draught of 4½ feet, and was equipped with a new 50 horsepower Standard Gas Engine.

Witness Crowley, an expert called by respondents, testified (Apostles, pp. 164, 165 and 166) that he was the manager of the Crowley Launch & Tug Boat Company and had been engaged in that business for twenty years on the Bay of San Francisco. He stated that he knew the launch "Seven Bells", and the barge in question, and says, unequivocally, that the launch was quite capable of handling that barge, which was a small one, between San Francisco and San Rafael; that his company did business on that run and used about the same size boat on the job, with the same engine; that a larger draft launch could not get into San Rafael Creek, except once in a while at a high tide, and the most practical boat would be one like the "Seven Bells". (Independent of any testimony, a glance at the chart would be sufficient to convince one of that fact, as at low tide there is only about one foot of water from the mouth of the creek to a considerable distance in the bay.) He further states that, in the exercise of his best judgment, he would have sent out the "Seven Bells" with

the barge in tow under the circumstances on that particular trip.

> "The towboat was strong enough to pull that barge under any ordinary conditions, except those particular squalls or heavy winds that morning" (Apostles, p. 175).

Witness McLaughlin, called by respondent, was also in the towing business on the bay and left the Port of San Francisco on the same morning with a barge in tow about 54 feet long, with a 30 foot beam and he used as a tug a launch 52 or 54 feet long, equipped with a 50 horsepower engine. He was bound for McNears Point, only a short distance from the entrance to San Rafael Creek (Apostles, p. 180).

Witness Doe, called by respondents, is the manager of the San Rafael Express Co., and had formerly operated the launch "President", of 50 horsepower, in handling freight between San Francisco and Sausalito, and started from the Port of San Francisco, at 8:30 in the morning of December 31, 1913, for Sausalito (Apostles, p. 191).

Both of these last named witnesses, thoroughly experienced and competent men started out on the same morning with similar equipment and both testify as to the unusual severity and suddenness of the storm which arose while they were on their respective voyages. We have searched the record in vain for any evidence which might tend to show a different custom or usage in this port, with reference to the type of launch and the proper equip-

ment for this trade. We challenge proctor for libelant to point out a single statement by any witness, his own included, which even suggests that the launch "Seven Bells" was not the usual type of craft employed in the trade, or which tends to show even a slight doubt in the mind of any witness that the launch "Seven Bells" was sufficient to meet the ordinary perils which might reasonably have been anticipated on that voyage.

On the direct examination of Mr. Codding, some mention was made of the competency of the captain, and a conversation was referred to on that point between Mr. Codding and Mr. O'Brien. It appears, however, that that conversation related entirely to the character of the captain and his method of loading and unloading the barge at San Rafael; Mr. O'Brien being of the opinion that the same was not done with promptness and dispatch, but the captain's ability as a navigator was never questioned (Apostles, p. 157). Mr. McLaughlin (for respondents), testified that Captain Gilmore was a proper and efficient party to place in charge of the tug and tow for such trips on the bay (Apostles, p. 189).

It is submitted that it clearly appears from the evidence that not only the respondents exercised due diligence to obtain a seaworthy launch, but that the launch was in fact seaworthy. The District Court neglected to find on the question of due diligence, which is, so far as the owner is concerned, the only requirement of the Harter Act.

THE INJURY WAS CAUSED BY A PERIL EXEMPTED UNDER THE HARTER ACT.

Was the loss or damage in the case at bar caused from fault or error in navigation, or management of the vessel? Was it a loss arising from the dangers of the sea, or other navigable waters? Can it be said to have been caused by an act of God? If any one of these questions is answered in the affirmative, the respondents represented by us are not liable.

We do not think it necessary to go into the evidence in detail in this connection, as the witnesses for both libelant and respondents were of the opinion that the storm was of unusual violence, "the worst which had even been known upon the Bay". The squalls which piled this barge up on the rocks of the Marin shore were not such as might have been anticipated by respondents, nor to be reasonably expected as an ordinary peril of the contemplated voyages which were necessary to the prosecution of their business. It cannot be contended that such a situation was even near that shadowy boundary line which distinguishes the dangers of the sea and the acts of God from those perils in which a human agency assisted, or could have been weathered with a seaworthy vessel properly equipped.

Libelant's witness, Silva, admitted that it was an unusual wind on the bay (Apostles, p. 56), and another of his witnesses, Peterson, testified that the heavy wind on the shoals near the creek made it very rough—"just like boiling water", and it was

an exceedingly difficult place to navigate (Apostles, p. 65). The libelant himself admits that it was blowing a gale at about 10:30 o'clock the morning of the accident (Cheda, p. 77). A very good idea of the severity of the gale can be gathered from the incident cited by Mr. Crowley, as an illustration. The schooner "Albion", loaded with coal at Fort Baker Wharf, had two anchors out in addition to her mooring lines, but the force of the wind parted all the lines and she was driven up on the beach (p. 163). The wind came up "all of a sudden, all at once" (Doe, Apostles, p. 193).

It having been shown that the launch and barge were both seaworthy and that the loss was caused by an act of God and a peril of the sea, the respondents are not liable.

SHOULD THE VOYAGE HAVE BEEN ATTEMPTED ON THE DAY IN QUESTION?

Whether the action of the captain of the tug, in leaving at the time he did, was proper or an error of judgment, or gross negligence, is a question which does not concern the liability of these respondents. That was clearly within the captain's province, and any interference with him in the exercise of his discretion would not only have been resented, but would have been highly improper. In this connection we quote from the syllabus of

Hanson v. Haywood Bros. and Wakefield Co.,
(C. C. A.) 152 Fed. 401:

> "The navigation and management of a vessel within the meaning of section 3 of the Harter Act, * * * includes the determination of the time and manner of leaving port, which is the prerogative of the master; and under said section, where a vessel was seaworthy and in all respects properly manned, equipped, and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage."

The owners of the barge testified that they never attempted to exercise any control over the "Seven Bells", as to when it should start on a voyage with its tow, and the owners of the "Seven Bells" testified that they never consulted the respondents on any matters pertaining to the navigation (Gilmore, Apostles, p. 125). They were simply obliged, under the contract, to get the barge to San Rafael and back again (respondent Halvorsen Transportation Co., Exhibit "A").

This Court, in *The Hardy,* 229 Fed. 985, speaking through Judge Gilbert, in an opinion handed down at the last term of the Court here, said:

> "A vessel which undertakes a towing service is not an insurer of the safety of the tow. It meets the full measure of its obligation if it is reasonably adequate to the towing service, and is in charge of men who possess and exercise the skill and care ordinarily exercised by those having experience in like service; and where the master is shown to have been experienced and competent, much must be left to the judg-

ment and discretion, and the burden rests on the owner of the tow to prove that loss or injury thereto resulted from negligence on the part of the tug. The Syracuse, 12 Wall. 167, 20 L. Ed. 382; The Cayuga, 16 Wall. 177, 21 L. Ed. 354; The Margaret, 94 U. S. 495, 24 L. Ed. 146; The Adelia, 154 U. S. 593, 21 L. Ed. 672."

IN REFERENCE TO THE "GOLDEN EAGLE".

The libelant's witness, O'Brien, claimed that he called up and was in communication with an officer of the respondent company in San Francisco, C. R. Codding, just after the barge had left and hazarded the opinion that the weather was too stormy for the "Seven Bells" to venture out alone with the barge and that they should send the "Golden Eagle" to assist it (O'Brien, Apostles p. 144). This is denied by Mr. Codding, who states that he received no message from San Rafael just after the barge had left. He telephoned to Mr. O'Brien, in San Rafael, between 10 and 11 o'clock that morning, to find out if the launch and barge had arrived there. At that time Mr. O'Brien made no claim that he had tried to reach him by telephone early in the morning (deposition C. R. Codding, Apostles, pp. 36, 37 and 38). We do not believe that this is sufficient to establish negligence even if it be assumed that the facts are as claimed by Mr. O'Brien.

In *Railroad Co. v. Reeves,* 10 Wall. 176, the instruction complained of was "that if the damages could have been prevented by any means within the

power of defendant, or his agents, and such means were not resorted to, then the jury must find for the plaintiff". The Supreme Court laid down the following rule, adopting the language of another case:

> "That when carriers discover themselves in peril by unavoidable accident the law requires of them ordinary care, skill and assistance which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them."

Tested by the above rule, the charge of negligence must fail. No authorities hold that it is the duty of a carrier to send a vessel to assist when a vessel in which cargo has been shipped would be liable to meet with heavy weather at the end of the voyage. A carrier certainly cannot be held liable for failure to send a vessel on a complaint made by one of its *employes* because in *his* opinion such a peril did exist. Moreover, it appears from the evidence that the launch "Golden Eagle" had too deep a draught to navigate in the shallow water near the mouth of San Rafael Creek. She had been in the creek once or twice, during smooth water at high tide, but was too large a vessel for that trade (deposition C. R. Codding, Apostles, p. 39). It would be idle to speculate on what assistance the "Golden Eagle" could have rendered had she started in time, because the fact is that she could not have proceeded to the locality where the launch

was in difficulty; even the "Seven Bells" struck bottom on every swell (Apostles, pp. 103-124).

THE BILL OF LADING CONTAINED OTHER VALID EXEMPTIONS.

The libelant bases his claim against the respondents (other than the "Seven Bells"), on an alleged violation of certain rights arising from a contractual relation. No evidence of a contract of carriage was introduced by libelant, but respondents proved a copy of the bills of lading delivered to libelant's assignors, and offered it in evidence (Respondent's Exhibit "B"). The libelant admitted that the goods were shipped under bills of lading and offered to produce the originals (Cheda, Apostles, p. 86), but, as he failed to do so, we may consider the one in evidence a true copy.

The case has been considered up to this point on the Harter Act alone, and as if no bills of lading were involved. In order not to unduly prolong this brief we will discuss only one exemption of the bills of lading not also provided for under the terms of the Act. They provided, among other things, that the respondents should only be required to exercise due diligenec to make the vessel seaworthy, and, if such diligence had been used, respondents should not be held liable for any loss caused by unseaworthiness. The vessel was not warranted seaworthy, except in so far as due diligence could make it so, and it was not to be

presumed that the respondents failed to exercise such diligence, but such failure must be alleged and proved by the shipper. So, even if it be held that the launch, "Seven Bells", was unseaworthy, because of the insufficiency of her engine, or for any other cause, and that such unseaworthiness was the proximate cause of the loss, the respondents cannot be held liable unless it is held that they failed to exercise due diligence in employing a seaworthy launch.

This is a valid provision in a bill of lading. The Harter Act has modified the policy of the law in that respect, and the vessel owner is no longer required to furnish a seaworthy vessel in any event, or be held liable for all injuries regardless of the character of the defect and his efforts to make the vessel seaworthy. The second section of that Act merely prohibits him from inserting any covenant in a bill of lading whereby his obligation *to exercise due diligence* to furnish a seaworthy vessel shall be lessened or avoided. The third section relaxes the policy of the former law by requiring only that the owner shall use due diligence to furnish a seaworthy vessel and provides that, if he does, he shall be exempt from losses caused by incidents therein specified.

In the case of *The Carib Prince,* 170 U. S. 655, the loss was caused by a latent defect in the construction of the peak tank of the vessel, and the Court held that she was unseaworthy on that account. The owners claimed that they were exempt

under the third section of the Harter Act, because the defect could not have been discovered by the exercise of due diligence. The Court held that the third section of the Harter Act did not of itself exempt a vessel from injuries caused by unseaworthiness, when due diligence had been used, but that the parties might so provide by contract. The vessel was held liable, as there was no such provision in the bill of lading.

In *The Arctic Bird,* 109 Fed. 167, decided by the District Court for the Northern District of California, the vessel was found unseaworthy, but the owners were held not liable because they had exercised due diligence to make the vessel seaworthy, and the bill of lading provided that, in that event, they should not be liable for injury caused by unseaworthiness on account of latent defects in any part of the vessel.

The question then on this point in the case at bar may be stated, as follows: Assuming that the owners of the barge were bound to exercise due diligence to furnish a seaworthy launch, could they by a careful inspection have ascertained that the launch did not have sufficient power to tow the barge on the San Rafael run in weather which might ordinarily have been expected, or that it was not the usual type of launch employed in that trade? In view of the uncontradicted, expert testimony that the launch was seaworthy, and was the usual type employed in such trade, it cannot be properly held that respondents failed to exercise

due diligence to obtain a suitable launch for towing the barge.

PROXIMATE CAUSE.

The District Court did not find whether the injury to the cargo was caused by the supposed unseaworthiness of the launch or by the peril of the sea which was encountered on the voyage. Independent of the Harter Act, the owners of the vessel exempted themselves, by the bills of lading, from damage caused by perils of the seas. Even if the respondents had failed to use due diligence in employing a suitable launch, still, if the proximate cause was a peril of the sea and not the alleged unseaworthiness of the launch, the respondents are not liable. The inquiry then is—if launches with greater horse power, and consequently larger boats with deeper draft, could have been, and were, operated in that trade, could the peril in the present case have been avoided with such a launch? Respondents are not liable if the storm would have driven the barge ashore had it been towed by such a launch.

The Planter, Fed. Cas. 11,207 (a);
The John C. Stevenson, 17 Fed. 540;
The Thomas Melville, 31 Fed. 486.

In the case of *The Samuel F. Houseman,* 108 Fed. 875, a barge was caught between two steamships in dock and sunk, damaging her cargo. The lower court held that the barge was unseaworthy

and rendered a decree in favor of the cargo owners. On appeal the Circuit Court of Appeals for the third circuit was not disposed to hold with the lower court on the question of seaworthiness, but held that it was not material because

> "an adequate and efficient cause of the sinking was shown by the testimony in regard to the storm * * * After a careful reading of the testimony on this point, we think that the sinking of the barge is reasonably accounted for by the testimony which connected it with the storm, and the consequent pressing together of the two large steamships, between which she was lying and in which dangerous place the appellee had allowed her to lie for 14 hours after she had been loaded."

In the case at bar the testimony shows that the storm encountered by the barge and launch was of unusual violence; that the launch was the largest which could have been used in that trade, and that even if she had been unseaworthy because of lack of power, a larger launch could not have prevented the accident. The fault was not lack of power in the launch; the propeller of the launch could not be kept in the water during the storm in the shallow bay near the entrance to the creek (Apostles, p. 132), and no steerage way could be had, due to her hitting bottom at every swell (Apostles, p. 195). This condition would have also parted the tow line (Apostles, p. 124).

In this connection, we call the attention of the Court to the rule that, where it is shown that the vessel encountered an excepted peril on the voyage,

which is sufficient to cause the injury, the cargo owner must then prove that the cause of the injury was unseaworthiness, rather than one of the excepted risks.

Transportation Co. v. Howner, 11 Wall. 29;
The John C. Stevenson, 17 Fed. 540;
Crowell v. Union Oil Co., 107 Fed. 302;
The Musselcrag, 125 Fed. 786.

THE LIABILITY OF THE RESPONDENTS IS LIMITED TO THE VALUE OF THE BARGE JUST AFTER THE ACCIDENT.

The Act of Congress of March 3, 1851 (Sec. 4283, U. S. Com. Laws; 9 Stat. 635), provides:

> "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, or any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The respondents allege in their answer:

> "That the said barge was in no way in fault for the loss of, and damage to, said goods and merchandise; that if the said barge should be so found in fault that the same was done, occasioned and incurred without the privity or knowledge of the said Halvorsen Transportation Company, the owner of said barge, and accordingly, under the Act of Congress of March

> 3, 1851 (The Limited Liability Act, so-called), the said owner's liability is limited to the amount or value of its interest in the said barge and freight just after the stranding and wreck, as aforesaid, and that the value of said interest is the sum of four hundred (400) dollars."

The Limited Liability Act may be pleaded in the answer, without filing a petition for that purpose in separate proceedings.

> *The Great Western,* 118 U. S. 520 (30 L. E. 156).

We quote from the opinion of the Court, on page 158:

> "Limited liability may be claimed, 1, merely by way of defense to an action; or, 2, by surrendering the ship or paying her value into court. The latter method is only necessary when the shipowner desires to bring all the creditors claiming damage into concourse for distribution."

The words "privity or knowledge" came before the Supreme Court in construing the Limited Liability Act, in the *La Bourgoyne,* 210 U. S. 96, on page 122. The Court, quoting from the case of *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.,* points out the necessity for a liberal construction of the Act by the Courts in favor of the shipowners, by stating that otherwise, the law would not be worth its enactment. It was there held that mere negligence did not of itself establish privity or knowledge on the part of the vessel owner within the meaning of the statute.

In the case of *The Colima,* 82 Fed. 665, the vessel capsized in a storm on account of improper construction of the vessel and the stowage of the cargo. It was found that her owners had not used due diligence to make the vessel seaworthy, and, consequently, were not exempt from liability under the Harter Act, but that, nevertheless, they were entitled to limit their liability under the Act of March 3, 1851. The test then to determine whether or not the injury was done, occasioned or incurred without the privity or knowledge of the owner cannot be predicated on the further question of whether or not he has used due diligence to furnish a seaworthy vessel.

We think it unnecessary to discuss the long line of authorities on these various points as this Court has already declared its policy of construing the Limited Liability Act in favor of the vessel owner. In *Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co.,* 197 Fed. 703, it was contended that the respondent company, the owner of the schooner "San Pedro", was not entitled to limit its liability because the president and manager of the company did not have the requisite knowledge to carry on the business in which the schooner was engaged, or to employ her officers. The Court says, in answer to that contention, on page 709:

> "It is contended that the evidence proved that he lacked the capacity to do this, and it is argued that, in order to be competent to manage a vessel, one must know something about the 'vessel business' and be able to judge of

> the competency of the people whom he is to employ, and that, in order to use intelligently the reports of employes concerning the fitness of a vessel and the proper equipment thereof, he must know how to manage vessels and know something of the dangers and difficulties to be provided against in navigating the same. It may be conceded that Atkinson did not possess all these qualifications. He was a business man, and, as such, for four years he had been the manager of the appellee's business. But we cannot concede that an owner of a vessel, in order to be entitled to limit his liability under the statutes, must, before sending his vessel on her way, acquaint himself with the science of navigation, or acquire expert knowledge concerning his vessel, its equipment, its machinery, or the necessary crew therefor, or must place between himself and the master an intermediary who shall possess such knowledge, and our attention has been directed to no authority which so holds. In Moore v. American Transportation Co., 24 How. 1, 16 L. Ed. 674, the Court said:
>
> 'The act was designed to promote the building of ships and to encourage persons engaged in the business of navigation.' "

When these cases are considered in connection with the failure of the District Court to find on this issue raised by the pleadings, we submit that even if respondents were liable,—and such liability we emphatically deny,—the Court erred in not referring to the Commissioner the question of the value of the respondents' interest in the freight and barge after the stranding and wreck.

Conclusion.

We respectfully submit:

1. That respondents had exercised due diligence to make the barge seaworthy.

2. That the barge was seaworthy.

3. That respondents had exercised due diligence to secure a seaworthy launch.

4. That the launch was seaworthy.

5. That the injury was caused by a peril of the sea and that the respondents are exempt from liability under the provisions of the Harter Act for the losses incurred by libelant and his assignors.

6. That if the loss was caused because the launch was unseaworthy, the respondents are still not liable because of the terms of the bill of lading which provided that in the event of loss the respondents should not be liable for any damage caused by unseaworthiness, if due negligence were used by respondents to secure a seaworthy launch, whether such unseaworthiness existed before or after sailing.

7. That the respondents were exempted under the provisions of said bills of lading for any damage caused by the perils of the sea, and if it be found that respondents failed to exercise due diligence to secure a seaworthy launch and that the same was not seaworthy, the respondents are still not liable if the proximate cause of the loss was a peril of the sea and not the unseaworthy condition of the launch.

8. That the evidence clearly proved the existence of a peril of the sea which was sufficient to account for the loss and that there is no evidence tending to show that the proximate cause of the loss was an unseaworthy condition of the launch.

9. That the injury was done, occasioned or incurred without the privity or knowledge of the respondents and that if liable at all their liability is limited to their interests in the barge and freight just after the accident.

Dated, San Francisco,
May 15, 1916.

Respectfully submitted,

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Ira S. Lillick,
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Hill & Sealby,
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